Supreme Court, U. S.
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76-1338

IN THE

Supreme Court of the United States

MARCH TERM, 1977

Case No. _____

MAE DIANA, ROSENELL SUSI,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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MAE DIANA, ROSENELL SUSI,
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vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

The petitioners Rosenell Susi and Mae Diana pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered in this proceeding on December 15, 1976.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported as *State v. Diana* (1976), 48 Ohio St.2d 199. The opinion of the Court of Appeals for the Tenth Ap-

pellate District, Franklin County, Ohio, is unreported. No written opinion was rendered by the Court of Common Pleas for Franklin County, Ohio. All opinions appear in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on December 15, 1976. No rehearing was sought. This petition for certiorari was filed within ninety days of that December 15 date as extended. This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. When individuals destroy their own personal papers at the time of a police search, is that destruction subject to a privilege or protection under the Fifth and Fourteenth Amendments to the Constitution of the United States such that the individuals are not guilty of tampering with evidence?

2. Is Section 2921.12 of the Ohio Revised Code unconstitutionally vague and overbroad?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V, Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1, Constitution of the United States:

> "Section L. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Revised Code, §2921.12 Page, 1953):

> "(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:
>
> "(1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation;
>
> "(2) Make, present, or use any record, document, or thing, knowing it to be false and with purpose to mislead a public official who is or may be engaged in such proceeding or investigation, or with purpose to corrupt the outcome of any such proceeding or investigation.
>
> "(3) Whoever violates this section is guilty of tampering with evidence, a felony of the third degree."

STATEMENT OF THE CASE

On December 20, 1974, Officer Harold Crabtree, other members of the Columbus Police Department, and Franklin County Sheriff's Officers executed a search warrant upon 1953 Oakland Park Avenue, in Columbus, Ohio. While Officer Crabtree, with the warrant, stood at the side door, other officers broke down the front door with sledge hammers and gained entrance to the address. The officers at the side door also forced their way into the residence with a sledge hammer after shouting that they were police officers with a warrant. None of the officers were in uniform.

Inside the house were Rosenell Susi, Mae Diana and Patrick Scott. Mrs. Diana had some papers in her hand which she was placing in the toilet. Some other pieces of paper and ashes were found in the kitchen area near the stove. Mrs. Susi was seen running out of the kitchen area. A piece of paper was removed from Mrs. Diana's hand. All three of the occupants were then detained in the living room while a detailed search was conducted.

As a result of the search and the actions which attended it, petitioners were each charged with three counts of gambling in violation of §2915.02 of the Ohio Revised Code and one count of tampering with evidence in violation of §2921.12 of the Ohio Revised Code, among other charges.

Prior to commencement of the actual trial, petitioners filed a written motion to dismiss the tampering with evidence charges on the grounds that §2921.12 of the Ohio Revised Code was in contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States. The pre-trial motion was overruled. Subsequently, the ruling was assigned as error

in the Court of Appeals for the Tenth Appellate District, Franklin County, Ohio, and was addressed by the Supreme Court of Ohio in *State v. Diana*, 48 Ohio St.2d 188 (1976). The opinion of the Supreme Court of Ohio substantiates these facts and shows that the federal questions here presented were timely and properly raised.

Petitioners were found guilty of two counts of gambling and of the tampering with evidence charge.

REASONS FOR GRANTING THE WRIT

1. THE SUPREME COURT OF OHIO HAS DECIDED FEDERAL QUESTIONS OF SUBSTANCE NOT HERETOFORE DETERMINED BY THIS COURT AND HAS DECIDED THE QUESTIONS IN A WAY INCONSISTENT WITH SUCH DECISIONS OF THIS COURT AS COULD POTENTIALLY APPLY.

The scope of the Fifth Amendment privilege against self-incrimination is by no means clear. On two recent occasions this Court has provided some guidance, but none which is directly on point with facts such as here. In *Bellis v. United States*, 417 U.S. 85 (1974) at pages 89 and 90, this Court reaffirmed that the historic functions of the Fifth Amendment privilege has been to protect a "natural individual from compulsory incrimination through his own testimony or personal records." See also *United States v. White*, 322 U.S. 694 (1944).

Last year this Court followed the decisions in *Bellis* with *Andresen v. Maryland*, 96 S.Ct. 2737 (1976) in which the issue was "whether the introduction into evidence of a person's business records, seized during a search of his offices, violates the Fifth Amendment's

command that "no person . . . shall be compelled in any criminal case to be a witness against himself."

Petitioners respectfully submit that their case presents the ideal opportunity for clarifying these recent decisions. First, the issue of what constitutes "personal papers" is squarely presented. Petitioners were prosecuted for having personal possession of the papers in question in a residence. No evidence indicated that the papers were ever outside of the residence or in the possession of third parties. No evidence indicated that the papers were anything other than the personal possessions of the petitioners.

Second, the issue of what criminal liability, if any, will lie for the destruction of ones own personal papers and effects is here placed before the Court. Does the Fifth Amendment bar only the introduction into evidence of the individual's personal papers? Or, does the Fifth Amendment bar prosecution for the destruction of one's own personal effects when law enforcement personnel are seeking the effects as a part of a criminal investigation?

The Supreme Court of Ohio resolved the issues here against the petitioners. However, petitioners submit that *Boyd v. United States*, 116 U.S. 616 (1886) coupled with *Bellis v. United States*, *supra*, and *Andresen v. Maryland*, *supra*, indicates a different determination.

The third issue presented is the question of whether or not the specific statute involved comports with Due Process of Law. The phrase "official investigation" is nowhere defined in Ohio law. "Evidence" is undefined. Ohio Revised Code §2921.12 can be reduced to approximately the following:

> "No person, being aware that probably some sort of proceeding before a governmental body is likely to occur shall alter or remove anything with purpose to impair its availability or value."

Such an edict does not comport with the now familiar holding in *Connally v. General Construction Company*, 269 U.S. 385 (1886) that:

> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

This issue also was resolved against the petitioners by the courts below.

CONCLUSION

For these reasons, a writ of certiorari should arise to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted,
TYACK, SCOTT, GROSSMAN & WISEMAN
/s/ THOMAS M. TYACK
Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this day of March, 1977, three copies of the Petition for Writ of Certiorari were personally delivered to the office of George C. Smith, Prosecutor for Franklin County, Ohio, and Counsel for the Respondent, at 369 South High Street, Columbus, Ohio. I further certify that all parties required to be served have been served.

TYACK, SCOTT, GROSSMAN & WISEMAN

/s/ THOMAS M. TYACK
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221-1341 (614)

APPENDIX A

OPINION OF THE SUPREME COURT OF OHIO

THE STATE OF OHIO, APPELLEE, *v.* DIANA ET AL., APPELLANTS,

Criminal law — Tampering with evidence — R. C. 2921.12, construed — Investigation in progress, when — Constitutionality of R. C. 2921.12.

1. Under the provisions of R. C. 2921.12, any person of ordinary intelligence knows or should know that an investigation of that person's criminal activity is in progress when a police officer seeks to gain entrance to the premises used for the criminal activity and advises that person that he has a search warrant; and such a person may not at that point destroy or conceal any record or document or thing with the purpose to impair its value or availability as evidence in such investigation.
2. R. C. 2921.12, is clear and persons of ordinary intelligence do not necessarily have to guess at its meaning or differ as to its application; the statute is not vague and it is not overbroad.

(No. 76-246—Decided December 15, 1976.)

APPEAL from the Court of Appeals for Franklin County.

Officers of the Columbus Police Department, on December 20, 1974, in the execution of a search warrant, conducted a search of a residence at 1953 Oakland Park Avenue.

As a result of that search, the defendants, Mae Diana and Rosenell Susi, were indicted on four counts relating to gambling, and a fifth count of being in violation

of R. C. 2921.12, in that the defendants, knowing that an official investigation was in progress or about to be or likely to be instituted, did alter, destroy, conceal or remove a record, document, or thing, with purpose to impair its value of availability as evidence in such proceeding or investigation.

Upon trial to a jury, defendants were convicted of two gambling counts and of the fifth count of being in violation of R. C. 2921.12. In the trial proceedings, defendants moved for the dismissal of the tampering with evidence charges for the asserted reason that R. C. 2921.12 violated the Fifth Amendment to the United States Constitution. The trial court overruled the motion.

The Court of Appeals for Franklin County affirmed the judgment of conviction as to each defendant.

The cause is now before this court pursuant to the allowance of defendants' motion for leave to appeal, but only as to the issue of the constitutionality of R. C. 2921.12.

Mr. George C. Smith, prosecuting attorney, and *Mr. David J. Graeff*, for appellee.

Messrs. Tyack, Scott & Colley and *Mr. Thomas M. Tyack*, for appellants.

CORRIGAN, J.

I.

The sole item of controversy in this appeal is the contention of appellants that R. C. 2921.12, under which they were convicted on one count of the indictment, is unconstitutional.

Appellants claim the statute presents three constitutional infirmities, viz.:

(1) the statute is vague;

(2) the statute is overbroad; and

(3) the statute violates the Fifth Amendment privilege against self-incrimination.

R. C. 2921.12 provides:

"(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:

"(1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation;

"(2) Make, present, or use any record, document, or thing, knowing it to be false and with purpose to mislead a public official who is or may be engaged in such proceeding or investigation, or with purpose to corrupt the outcome of any such proceeding or investigation.

"(B) Whoever violates this section is guilty of tampering with evidence, a felony of the third degree."

II.

Before addressing appellants broad-gauge attack on R. C. 2921.12, one must examine the noteworthy facts giving rise to this appeal.

When the police officers went to 1953 Oakland Park Avenue to execute the search warrant, they appeared simultaneously at the side door and the front door of the house. After knocking, the officer at the front door said, "police officer," following which the scuffling of feet inside was heard. At the same time, the officer at the side door shouted to the occupants that they were police officers with a search warrant. Thereupon, entrance was gained to the house by breaking down both doors.

At the time the officers entered, appellant Diana was seen in the bathroom talking on the telephone, at which

time she slammed the bathroom door shut. The police broke open the bathroom door and found Diana stuffing water-soluble paper into the commode. These papers were described in the record as tally sheets called in to the banker by lieutenants who, in turn, received the bets and numbers from the number writers. There was further testimony that Diana was also chewing something in her mouth and had a half-sheet of paper in her hand.

At this time, too, appellant Susi was seen in the kitchen, where she was burning pieces of paper in a fire on the stove. The pieces of paper were identified as adding machine tape by the police witnesses who retrieved the unburned pieces of paper and also the charred paper, which was reconstructed as far as possible and photographed in the police laboratory.

Before the trial, appellants filed motions to suppress the evidence secured under the search warrant for the reason that the affidavit for the search warrant fails to show probable cause to believe that the items sought to be searched for were on the premises to be searched and that the search was improper and in violation of appellants' rights under the Fourth and Fourteenth Amendments to the United States Constitution.

These motions to suppress were overruled by the trial court.

The second and third gambling counts of the indictment upon which appellants were convicted each charge a previous conviction on a gambling offense, in addition to the current charge.

From the facts, it appears that the only parts of the challenged statute involved here are R. C. 2921.12(A) (1) and (B).

III.

We consider first appellants' vagueness argument as to R. C. 2921.12(A) (1). Appellants complain that "official investigation" is not defined, "so one must speculate as to what all is included therein"; that "evidence" is also an undefined term. The landmark decision concerning "vagueness" in our constitutional jurisprudence is the case of *Connally v. General Construction Co.* (1926), 269 U.S. 385, 391, which articulates:

"* * * [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process."

In the frame of facts in the record before us, it would seem that appellants herein are persons of uncommon intelligence in the area of gambling. The record establishes that they have been through prior legal proceedings in connection with the crime of gambling, and it follows that they surely know what the word "evidence," as used in R. C. 2921.12(A) (1), means. And, it would be an exercise in naivete on our part to accept the appellants' suggestion that their constitutional rights have been violated because the phrase "official investigation" is not defined in R. C. 2921.12(A) (1). If these females of the gambling sorority, apparently graduated to criminality as professional gamblers, do not apprehend that the serving of a search warrant heralds the beginning of an investigation of a crime involving them, because they are the only persons named in the search warrant as conducting the criminal gambling operation at the place searched, then the Introduction of Through the Looking-Glass of Lewis

Carroll's Alice should be revisited by all persons connected with the administration of justice in order to be fortified by what Alice found there:

"Child of the pure, unclouded brow
And dreaming eyes of wonder!
Though time be fleet and I and thou
Are half a life asunder,
Thy loving smile will surely hail
The love gift of a fairy tale."

IV.

Equally fanciful is the suggestion of appellants that R. C. 2921.12(A) (1) is unconstitutional because of overbreadth.

There is a comprehensive discussion of the "overbreadth doctrine" applicable to statutes in *Broadrick v. Oklahoma* (1973), 413 U.S. 601.

Broadrick involved interpretation of an Oklahoma statute patterned after the Federal Hatch Act, both of which regulated political activity of public employees. In upholding the statute as not being either overboard or vague, the majority and dissenting opinions went into extensive discussion as to the applicability of the overbreadth doctrine.

The majority cited past opinions relating to overbreadth which were almost exclusively concerned with the First Amendment to the United States Constitution.

The overbreadth doctrine is closely connected with rights in the First Amendment because a statute may be deemed unconstitutional on its face when that statute fails to distinguish between conduct that may be proscribed and conduct that must be permitted. At page 615, in *Broadrick*, the following language appears:

"It remains a 'matter of no little difficulty' to determine when a law may properly be held void on its face and when 'such summary action' is inappropriate, *Coates v. City of Cincinnati*, 402 U. S. 611, 617 * * *. But the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise, unprotected behavior that it forbids the state to sanction moves from 'pure speech' toward conduct * * *."

Broadrick then makes the specific point that only in exceptional circumstances, predominantly dealing with First Amendment issues, will a court rely on overbreadth.

The theory behind this seems to relate to "standing," and the concept of overbreadth not occurring in the facts of the case at bar.

In *Broadrick*, at page 610, it is stated:

"Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the court. * * * [Citations omitted.] A closely related principle is that constitutional rights are personal and may not be asserted vicariously."

Finally, the majority, in *Broadrick*, states, at page 613:

"Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute."

Appellants, in their brief, cite *Gooding v. Wilson* (1971), 405 U. S. 518, and *State v. Schwing* (1975), 42 Ohio St. 2d 295, as recent examples of overbreadth

which impinges upon Fifth Amendment areas. *Schwing* is a First Amendment case. Appellants then list examples of situations which they feel show the basis for claiming the statute is overbroad.

Whatever the merits of these examples of overbreadth that appellants have brought forth, it is appellee's position that, as stated in *Broadrick*, a statute is not overbroad where the state admittedly has power to regulate the conduct in question.

In *Broadrick*, at page 615, it is stated further:

"To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."

The "plainly legitimate sweep" of R. C. 2921.12 is to prohibit the tampering with evidence. The fact that appellants can raise a number of examples of areas that fall outside the statute does not warrant this court declaring it unconstitutional because of overbreath. Nor are R. C. 2921.12(A)(2) and (B) facially overbroad.

Appellant's second asserted basis for constitutional infirmity in R. C. 2921.12 is rejected.

V.

Appellants' third and final argument is that the statute violates the Fifth Amendment privilege against self-incrimination, since the papers seized at the time of appellants' arrest were personal in nature and, therefore, protected by the Fifth Amendment.

In *Bellis v. United States* (1974), 417 U. S. 85, it is stated, at page 87:

"It has long been established, of course, that the Fifth Amendment privilege against compulsory self-

incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony. In *Boyd v. United States*, 116 U. S. 616 (1886), we held that 'any forceable and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime' would violate the Fifth Amendment privilege. * * *"

In *Bellis*, the Supreme Court held that the Fifth Amendment privilege against self-incrimination was not available to a member of a dissolved law partnership who had been subpoenaed by a grand jury, to produce the partnership's financial books and records, since the partnership, though small, had an institutional identity and petitioner held the records in a representative, not a personal, capacity. The privilege is limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records.

The *Bellis* case is one of the most recent in a long line of cases which have stressed the personal right of the privilege. The case also clearly distinguishes between the subject matter of the past cases and the one at bar.

The subject matter of the *Bellis* case were personal documents which were not illegal to possess. Their prospective use in a court of law would presumably give information which would assist in the conviction of an accused.

In the present case, the act of possession is illegal, since the papers seized were used as gambling devices and thus cannot be afforded the protection under the Fifth Amendment. In reality, it is no different than any other type of real evidence introduced as material

and relevant to the commission of the offense charged.

In the *Boyd* case, *supra* (116 U. S. 616), a federal statute authorized a court through proper motion to require the defendant to produce in court his private books or papers, or else the allegations were to be taken as confessed. In ruling the act unconstitutional, the court held that the seizure or compulsory production of a man's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself.

The clear distinction, however, is where the papers themselves are illegal. As the Court of Appeals noted, in its opinion:

"Would the defendants contend that in the enforcement of counterfeiting laws that there could be no confiscation of counterfeit money because such money is a private paper which cannot be used as evidence to convict the defendant of a crime? We think not. * * *"

Appellants' third claimed constitutional infirmity in R. C. 2921.12 just does not exist.

For the reasons stated, the judgment of the Court of Appeals as to each appellant is affirmed.

Judgment affirmed.

O'NEILL, C. J., HERBERT, STERN, CELEBREZZE, W. BROWN and P. BROWN, JJ., concur.

APPENDIX B

1976 Term

THE STATE OF OHIO,)
) *To wit:* December 15, 1976
City of Columbus.)

STATE OF OHIO,
Appellee,

vs.

MAE DIANA et al.,
Appellants.

No. 76-246

APPEAL FROM THE COURT OF APPEALS FOR FRANKLIN COUNTY

This cause, here on appeal from the Court of Appeals for Franklin County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals as to each appellant is affirmed for the reasons set forth in the opinion rendered herein, *and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.*

It is further ordered that the ..... appellee ... recover from the ..... appellant ... its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this ..... day of ..... 19....

.....Clerk

.....Deputy

APPENDIX C

IN THE COURT OF APPEALS FRANKLIN COUNTY, OHIO

No. 75AP-210

STATE OF OHIO,
Plaintiff-Appellee,

v.

MAE DIANA,
Defendant-Appellant.

No. 75AP-211

STATE OF OHIO,
Plaintiff-Appellee,

v.

ROSENELL SUSI,
Defendant-Appellant.

DECISION

Rendered on December 23, 1975

STRAUSBAUGH, P. J.

This is an appeal by defendants from an order of the Common Pleas Court overruling defendants' motion for a new trial and overruling defendants' motion for acquittal. The record reveals that on December 20, 1974, officers of the Columbus Police Department con-

ducted a search of 1953 Oakland Park Avenue, Columbus, Ohio, as the result of which defendants were each charged with (1) engaging in bookmaking in violation of R. C. 2915.02; (2) Establishing, promoting, operating, knowingly engaging in conduct which facilitated a scheme or game of chance conducted for profit in violation of R. C. 2915.02; (3) Purposely violating R. C. 2915.02(A)(1) and (2), acquiring, possessing, controlling or operating a gambling device; (4) Being in violation of R. C. 2915.03, being the owner, lessee or person having the custody, control or supervision of premises known as 1953 Oakland Park, did use or occupy such premises for gambling in violation of R. C. 2915.02; (5) Being in violation of R. C. 2921.12, knowing that an official proceeding or investigation was in progress or about to be or likely to be instituted, did alter, destroy, conceal or remove a record, document, or thing, with purpose to impair its value or availability as evidence in such proceedings or investigation.

In the first four counts the defendants were charged with having been previously convicted of a gambling offense on July 15, 1974, in the Franklin County Court of Common Pleas.

On the first day of the trial, March 4, 1975, the court overruled defendants' motion to suppress. Upon trial to the jury defendants were convicted of violations of counts two, three, and five of the indictment from which convictions these appeals are taken.

Defendants' first assignment of error is:

> "The trial court erred in failing to suppress the evidence seized upon December 20, 1974."

The affidavit upon which the search warrant was based states in part that the affiant says:

> "* * * he has good cause to believe and does believe

> that numbers slips, tally tapes, gambling paraphernalia and related material in violation of O.R.C 2915.02 are being kept in a certain building or room or location known as 1953 Oakland Park Avenue and curtilage Columbus, Ohio, in said City of Columbus in violation of Section 2915.02 O.R.C.
>
> "The facts upon which such belief is based are as follows:
>
> "Information received from a reliable informant who has given reliable and factual information in the past which has led to the arrest and conviction of other persons involved in gambling-related offenses states that: on November 13, 1974, one Mae Diana and Rosenell Susi were taking numbers bets over the telephone between the hours of 8 am and 11:30 am. Informant stated that the above two subjects would call informant between those hours and take daily numbers bets by phone Monday through Friday, and the informant stated that numbers money pick-ups
>
> "Attachment number 1 (separate page).
>
> "The facts upon which such belief is based are as follows:
>
> "Were being made on Thursdays, and numbers hits were being paid on Fridays, and if anyone was missed on Friday, they would pick up the hits on Monday.
>
> "Personal observation by members of the Columbus Police Department observed one Mae Diana on November 21, 1974, make a stop in the evening at 278 N. Monroe, where a known and convicted numbers person lives. This was between the hours of 4 and 5 p.m. This activity was also observed on 11/29/74.
>
> "On December 6, 1974, between 4 and 5 p.m., one Mae Diana and Rosenell Susi were observed in the rear of 969 Mt. Vernon, Sonny's Shoe Shine Parlor, meeting one Lucious Rose, a known and convicted gambler in relationship to numbers bets.

"The following pattern has been observed by Officer H. Crabtree from December 3, 1974, up to and including December 13, 1974: that one Paul Diana of 5099 Maplewood, husband of Mae Diana, would leave at approximately 6 a.m., with his wife, and stop by 2709 Lakewood Dr. Minerva Park, and would pick up one Rosenell Susi, sister of Mae Diana and would head south to the German Village area of Frankfort and Lazelle.

"On December 12, 1974, it was observed that Mae Diana and Rosenell Susi entered 754 Lazelle, and also on December 13, 1974.

"They would enter 754 Lazelle at approximately 6:30 a.m., and remain there up until approximately 12:00 noon.

"Contact was made with the informant on December 12, 1974, which stated: they had received telephone calls between 8:00 a.m., and 11:30 a.m., from Mae Diana and Rosenell Susi to record daily numbers bets which the informant had taken.

"Contact was made with one of the informants as late as December 13, 1974, at 9:00 a.m., which stated that the informant had received a telephone call from one of the two persons, Mae Diana, Rosenell Susi.

(Signed) Harold Crabtree
Police Officer.

"Sworn to before me and subscribed in my presence this 20th day of December, A.D., 1974.

(Signed) G. W. Fais,
Judge, Franklin County
Municipal Court, Columbus, Ohio."

"Attachment, search warrant - affidavit.

"On December 13, 1974, at approximately 11:00 a.m., after receiving information that Mae Diana and Rosenell Susi were continuing their numbers operation at 754 Lazelle, a search warrant was

executed at 11:00 a.m. It was determined after the search warrant was executed that the subjects left at approximately 10:30 a.m.

"A check the following day, December 14, 1974, with a reliable informant, stated the following: that an unknown subject gave Mae Diana and Rosenell Susi advance warning that the police were on the way to execute a search warrant, at which time they left.

"The reliable informant also stated that the following week, a person referred to them as one 'Shorty,' driving a blue pick-up truck, would be making a pick up of the above two subjects and remove them from Minerva Park, where they lived.

"On Tuesday, December 17, 1974, at approximately 6:45 a.m., a blue pick-up truck, license 4KK619, picked up Mae Diana and Rosenell Susi from their homes in Minerva Park and transported said two subjects south on Cleveland Avenue.

"On Wednesday, December 18, 1974, at approximately 6:45 a.m., the same blue truck pulled in with a M/W subject in his 50's, picked up Mae Diana and Rosenell Susi and transported them to 4628 Cleveland Avenue, where they met with a person later identified as Patrick Scott, 1953 Oakland Park, at which time this subject driving a light-colored Toyota, transported Mae Diana and Rosenell Susi to 1953 Oakland Park.

"On Thursday, December 19, 1974, the same pattern held true, with the exception that Patrick Scott transported said two subjects in a Monte Carlo with a white top and burgandy bottom, #62389, to 1953 Oakland Park. On December 20, 1974, at approximately 6:25 a.m., a blue truck #4KK619, made the pick up of Mae Diana and Rosenell Susi, transported them to 4628 Cleveland Avenue where one Patrick Scott picked up the said two subjects and transported them to 1953 Oakland Park Avenue.

"The reliable informant mentioned above stated that on December 19, 1974, that between the hours of 8:00 a.m. and 11:30 a.m., the informant had received a phone call from Mae Diana and Rosenell Susi at which time numbers bets were turned in to said subjects.

"Based on the above information it is respectfully requested a search warrant be issued for the residence at 1953 Oakland Park Avenue, Columbus, Ohio, and curtilage.

(Signed) Harold Crabtree
Police Officer.

"Sworn to and subscribed in my presence this 20th day of December, A.D., 1974.

(Signed) G. W. Fais,
Judge, Franklin County
Municipal Court, Columbus, Ohio."

Defendants maintain that the above affidavit fails to comply with the two-pronged test set forth by *Aguilar v. Texas* (1964), 378 U.S. 108, or follow the law as set forth by the United States Supreme Court in *Spinnelli v. United States* (1969), 393 U.S. 410, or by the Ohio Supreme Court in *State v. Joseph* (1971), 25 Ohio St. 95.

We cannot agree with defendants' position. The affidavits set forth the personal observations of members of the Columbus Police Department from November 13, to December 19, 1974, the day prior to the issuing of the search warrant. Information supplied by the informant was verified by police officers observing occurrences which the informant stated would take place. Rather than failing to comply with the rules laid down by the Supreme Court of the United States and of Ohio, it would seem that the information supplied to the magistrate issuing the search warrant,

resulted from diligent police work, properly set forth in affidavit form, upon which a search warrant could be issued based upon the rules set forth by the United States and Ohio Supreme Courts. We find no abuse of discretion on the part of the judge issuing the search warrant, nor on the part of the trial court in failing to suppress the evidence seized December 20, 1974.

The first assignment of error is overruled.

In their second assignment of error the defendants claim that:

"The trial court erred in ruling that Ohio Revised Code §2921.12 was not in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States as applied to the facts of this case."

R. C. 2921.12 provides:

"Tampering with evidence.

"(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:

"(1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation;

"***"

Defendants cite a number of cases to support their position. In *Boyd v. United States* (1886), 116 U.S. 616, the statute complained of authorized a court of the United States, in revenue cases, on motion of the government attorney, to require the defendant or claimant to produce in court his private books, invoices, and papers, or else the allegations of the government attorney are to be taken as confessed. The Supreme Court held such act to be unconstitutional and void as

applied to suits for penalties, or to establish a forfeiture of the party's goods, as being repugnant to the Fourth and Fifth Amendments of the Constitution. The court held that it was equivalent to a conpulsory production of papers to make the non-production of them a confession of the allegations which it is pretended they will prove. The court held that the seizure or compulsory production of a man's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself, and, in a prosecution for a crime, penalty, or forfeiture, it's equally within the prohibition of the Fifth Amendment.

In *Bellis v. United States*, 16 Crim. Law Rptr. 3111, decided May 28, 1974, the Supreme Court held that the Fifth Amendment privilege against self incrimination was not available to a member of a dissolved law partnership who had been subpoenaed by a grand jury to produce the partnership's financial books and records, since the partnership, though small, had an institutional identity and petitioner held the records in a representative, not a personal, capacity. The privilege is "limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records."

United States v. White, 322 U.S. 694, 701, held that the custodian of a labor union's records has no constitutional right, either under the search and seizure clause of the Fourth Amendment, or the guarantee of the Fifth Amendment, that no person shall be compelled in any criminal case to be a witness against himself, to refuse to produce such records at a grand jury investigation, in compliance with a subpoena duces tecum upon the ground that they might tend to incriminate

the union or himself. The court held that the privilege against self incrimination is purely personal and, therefore, cannot be utilized by or on the behalf of any organization.

We find that there is a distinction between the cases cited by defendants and the present case. The subject matter of the foregoing cases were communications which in and of themselves were not illegal but which gave information which would convict a defendant of an illegal act or crime. Here, the act of making the communication, or the possession of such communication, is an illegal act. Would the defendants contend that in the enforcement of counterfeiting laws that there could be no confiscation of counterfeit money because such money is a private paper which cannot be used as evidence to convict the defendant of a crime? We think not. The papers here are illegal per se as gambling devices, the possession of which is a crime. We hold that such papers are personal papers; but because they are illegal personal papers, they are not afforded the protection of the Fifth Amendment.

The facts in this case are undisputed. In executing the search warrant police officers appeared simultaneously at the front door and at the side door of the house at 1953 Oakland Park. Officer Dunning testified that he knocked and said, "Police" after which the scuffling of feet was heard. The door was then broken open, whereupon, defendant Diana was seen in the bathroom talking on the telephone; at which time she slammed the door. Defendant Susi ran from the living room into the kitchen and burned pieces of paper identified as adding machine tape on a fire on the stove. The officers retrieved the unburned pieces of paper and the charred paper which has been reconstructed insofar

as possible and photographed in the police laboratory.

At the same time, the police broke open the bathroom door and found defendant Diana stuffing water soluble paper, described as tally sheets called into the banker by lieutenants who in turn receive the bets and numbers from the number writers, into the commode. There was further testimony that defendant Diana was also chewing something in her mouth, with a half sheet of paper in her hand, which the officers removed from her hand.

We further find from the undisputed evidence that the execution of the search warrant could be found to be an official proceeding, or investigation, which was in progress and that resulting from such proceeding a trial was likely to be instituted. There was further evidence which the trier could find indicating that the defendants were in the process of destroying records and documents, with a purpose to impair their value or availability as evidence in the proceeding or investigation. We, therefore, overrule defendants' second assignment of error.

Defendants' third and sixth assignments of error are:

"3. The trial court erred in failing to require the state to elect which charges it would proceed under at the beginning of trial."

"6. The trial court erred in allowing the defendants to be convicted under both counts two and three of the indictment."

R. C. 2941.25(A) provides:

"Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."

In *State v. Fluellen*, unreported case number 74AP-138, (1974 Decisions, page 1920), rendered July 30, 1974, this court held that the above section relates to convictions and not prosecutions and that "the prosecution is not required to elect, at any time prior to submission of the case to the jury, upon which of the counts charging allied offenses of similar import it will proceed." (Page 1923.) We further find that there is a distinction between counts two and three and that charges are dissimilar and an election is not required. Defendants' third and sixth assignments of error are overruled.

Defendants' fourth assignment of error is:

"The trial court erred in allowing the state to keep the identity of the informant confidential while overruling defendants' motion for mistrial."

In reviewing the testimony objected to, we find that a mistrial is required only where irreparable harm is done which cannot be corrected. Such matters lie largely within the sound discretion of the court. Here, we find no irreparable harm has been done. The trial court originally overruled defendants' objection to certain testimony and then subsequently, the next day, excluded said testimony with instruction to the jury to disregard it. The lapse between the two occurrences was not appreciable in point of time. We find that there has been no abuse of discretion on the part of the trial court and, therefore, overrule defendants' fourth assignment of error.

Defendants' fifth assignment of error is:

"The trial court erred in overruling at the close of all the evidence, defendants' motion for acquittal as to counts two, three and five."

Defendants contend that there was insufficient evi-

dence to sustain convictions for establishing, promoting, operating, knowingly engaging in conduct which facilitated a scheme or game of chance conducted for profit. We find that there is sufficient evidence contained in the record both by way of physical evidence in addition to undisputed testimony tending to establish the operation of a numbers bank at the premises in question. At the time the residence was forcibly entered, tally sheets and adding machine tapes were observed by the officers and to be in the process of being destroyed. We find that there was sufficient evidence to support a finding of quilty as to count two.

Defendants claim that there was insufficient evidence to sustain a conviction that the defendants with purpose did violate R. C. 2915.02(A)(1) and (2), acquire, possess, control or operate a gambling device. We find that there is no statutory requirement that a device be used exclusively for gambling purposes. Water soluble paper containing written memorandum for gambling purposes may be found to be a gambling device; likewise an adding machine used for gambling purposes falls within the meaning of the statute, although such adding machine may be used for other purposes. We find that the court did not err in overruling defendants' motion for acquittal as to count three.

The uncontroverted evidence submitted by the prosecution bearing upon count five has previously been commented upon in our ruling upon assignment of error number two. We find that there is sufficient evidence to support a finding of guilt as to count number five. The fifth assignment of error is, therefore, overruled.

Defendants' seventh assignment of error is:

> "The trial court erred in allowing opinion testimony from non-expert witnesses as to probability and profits of certain activities."

The record indicates that the officer who testified concerning the operations of the numbers racket had had experience in this type of gambling. Although said officer was not a mathematical expert, we find that in order for a witness to testify as to the operation of gambling wherein it relates to the operations of the so-called numbers racket, it is not necessary for the witness to be an expert in the field of mathematics. The question of qualification to give opinion testimony is largely within the sound discretion of the trial court and, in this case, we find no abuse of discretion. The seventh assignment of error is overruled.

Assignment of error number eight is:

> "The trial court erred in its charge to the jury:
> "(a) as to what constitutes a 'thing' for purposes of Ohio Revised Code §2921.12."

We find that for the purposes of this case it was not necessary for the court to give a definition of the word "thing" to the jury for the reason that such definition would be superfluous. The evidence in the case indicates that the defendants were in the process of destroying records and documents; nothing else was being destroyed. Therefore, the argument that defendants raise about the use of the word "thing" and the application of the principle of *ejusdem generis* is inapplicable for the reason that the items being destroyed fell within the definition of the words, "record" and "document."

Defendants further object that:

> "The trial court erred in its charge to the jury:
> "(b) as to what constitutes an investigation for purposes of Ohio Revised Code §2921.12."

The definition given by the trial court was "an official investigation is an inquiry into the legality or illegality of facts which is in process of being made by officials of one or more levels of government, law enforcement." Although such definition might well have been elaborated upon, we find that it is sufficient to

apprise the jury as to the meaning of the word investigation; there is no prejudice to defendants in the failure of the trial court to grant the request.

We find that the trial court did not err in its charge to the jury as to the requirements for conviction under R. C. 2915.02. A careful examination of the charge indicates that there was a sufficient distinction made by the court between gambling purposes for the defining of gambling devices and the purpose to violate subdivisions (A)(1), (2), (3), or (4), of 2915.02. We find that the trial court limited the tampering with evidence charge to the evidence presented while noting the term gambling device and how it was to be applied. The eighth assignment of error is overruled, and the judgments are affirmed.

Judgments affirmed.

REILLY, J., concurs.

WHITESIDE, J., concurs in part; dissents in part.

WHITESIDE, J., concurring in part and dissenting in part.

Although I concur in the majority opinion with respect to assignments of error Nos. 1, 2, 3, 4, 5 as to counts two and three, 6, 7, 8(b), 8(c), and in the affirmance of the judgment as to counts two and three, I must respectfully dissent from the overruling of assignment of error No. 5 as to count five and No. 8(a).

Count five charges a violation of R. C. 2921.12, which provides:

> "(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:

> "(1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation;
>
> "(2) Make, present, or use any record, document, or thing, knowing it to be false and with purpose to mislead a public official who is or may be engaged in such proceeding or investigation, or with purpose to corrupt the outcome of any such proceeding or investigation.
>
> "(B) Whoever violates this section is guilty of tampering with evidence, a felony of the third degree."

The trial court correctly charged the jury as to the meaning of "official proceeding" and "official investigation," as used in R. C. 2921.12, as follows (Tr-276):

> "Official proceeding means any proceeding before a legislative, judicial, administrative, or other departmental agency or official authorized to take evidence under oath.
>
> "An official investigation is an inquiry into the legality or illegality of facts which is in process of being made by the officials of one or more levels of government, law enforcement."

Execution of a search warrant does not fall within either of the foregoing definitions. Execution of a search warrant is not "an inquiry into legality or illegality of facts"; rather, it constitutes a search (not an inquiry), for evidence. Although no one can condone the actions of defendants in attempting to destroy evidence of their illegal activity when the police announced their presence, such actions, even though reprehensible, do not constitute a violation of R. C. 2921.12.

The trial court erred in refusing to charge the jury upon the word "thing," as used in conjunction with the

words "document" and "record" in the phrase, "any record, document, or thing." The doctrine of *ejusdem generis* is clearly applicable, as set forth in the second paragraph of the syllabus of *State v. Aspell* (1967), 10 Ohio St. 2d .1, as follows:

> "Under the rule of *ejusdem generis*, where in a statute terms are first used which are confined to a particular class of objects well-known and definite features and characteristics, and then afterwards a term having perhaps a broader signification is conjoined, such latter term is, as indicative of legislative intent, to be considered as embracing only things of a similar character as those comprehended by the preceding limted and confined terms."

The trial court, by refusing to charge upon this rule of construction when requested by defendants, left the jury free to apply the broadest possible meaning to the word "thing," as used in R. C. 2921.12. Criminal laws, however, must be strictly construed.

This court cannot properly make the factual determination that the things destroyed by defendants were in fact records or documents, or something of a similar character thereto, because the defendants were entitled to have such factual determinations made by the jury under the proper instructions from the court. As indicated above, the jury was permitted to give the broadest possible application to the statute without the benefit of any definitive or limiting instruction by the court, despite defendants' specific request therefor. This, in my view, constituted prejudicial error.

APPENDIX D

IN THE COURT OF APPEALS
FRANKLIN COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,

v.

MAE DIANA,
Defendant-Appellant.

No. 75AP-210

JOURNAL ENTRY JUDGMENT

For the reasons stated in the decision of this court rendered herein on December 23, 1975, the assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Common Pleas Court of Franklin County, Ohio, is affirmed.

STRAUSBAUGH, P.J., and REILLY, J.

By .....

Judge Dean Strausbaugh, P. J.

IN THE COURT OF APPEALS
FRANKLIN COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,

v.

ROSENELL SUSI,
Defendant-Appellant.

No. 75AP-211

JOURNAL ENTRY JUDGMENT

For the reasons stated in the decision of this court rendered herein on December 23, 1975, the assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Common Pleas Court of Franklin County, Ohio, is affirmed.

STRAUSBAUGH, P.J., and REILLY, J.

By .....

Judge Dean Strausbaugh, P. J.